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LOW NAM HUI & SONS SDN BHD

v.

HUANG YAN TEO

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COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
LOW HOP BING JCA
[CIVIL APPEAL NO: J-03-16-2007]

C

19 SEPTEMBER 2007

CIVIL PROCEDURE: *Execution - Stay - Application for stay of execution of order for summary judgment pending appeal - Principles applicable - Triable issues of fact and law - Special circumstances -*

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Whether judgment would be rendered nugatory if stay granted

This was an application by the appellant for an order to stay the execution of the High Court judge's order dismissing the appellant's appeal against the decision of the senior assistant registrar granting summary judgment in favour of the respondent –

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in respect of his claims against the appellant for payment of fees – pending appeal to the Court of Appeal. The dispute herein arose from a consultancy agreement ('agreement') which the respondent and six other parties ('consultants'), on one hand, and the

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appellant, on the other, had entered into for the sole purpose of listing the shares of a financially distressed company, and for this purpose, the consultants offered their expertise and services to the appellant for obtaining all the relevant approvals for the purpose of a reverse take-over exercise and listing of the shares in the

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Kuala Lumpur Stock Exchange ('KLSE'), subject to and in accordance with the conditions in the agreement. The appellant contended that this was a case where judgment should not have been given summarily without a full trial on conflicting affidavit evidence since there were triable issues of fact and law. It also

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submitted that the respondent had failed to procure the listing by the extended date of 31 December 2001 and that the listing on or about 25 July 2003 of one Harn Len Corporation Bhd ('Harn Len') was procured by the appellant's sole effort, not the respondent's. The appellant further averred that granting a stay would not render the judgment nugatory as the appellant was

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financially sound and would be able to pay the judgment sum in the event it lost the appeal. The respondent, in objecting to the stay, argued that there were no triable issues and that merit of the case was not a ground for stay. He submitted that the delay in the listing was caused by the appellant and further contended that there were no special circumstances to justify a stay.

Held (allowing the application)
Per Mokhtar Sidin JCA delivering the judgment of the court:

(1) The appellant in its defence had seriously disputed the respondent's claim, who nevertheless maintained that he had fulfilled his undertaking, notwithstanding that the listing was procured well beyond the extended date of 31 December 2001, *ie*, on or about 25 July 2003. The appellant contended that as the respondent had failed to obtain all the relevant approvals from the relevant authorities and to procure the listing within the stipulated time, he had not fulfilled his promise of the condition precedent and was, therefore, not entitled to receive any fees or payment for his failure. The respondent contended that the delay for the listing was caused by the failure of the appellant to satisfy the conditions imposed by the authorities. Directly related to this issue of failure to procure the listing by the stipulated extended date was another issue on the serious dispute between the parties *ie*, the respondent disputed the appellant's claim that, after the extended deadline, of 31 December 2001, the appellant had obtained solely on its own efforts the listing of the shares of Harn Len on the KLSE. Without deciding on the merit of the case proper, it was clear that the above two issues were triable issues of fact and were central to the dispute between the two parties. These two issues could only be resolved at a full trial, where the judge would have the advantage of seeing and hearing the witnesses, and evaluating their credibility and the oral and documentary evidence. This could not be achieved fairly on conflicting affidavit evidence in this case in an O. 14 summary judgment application. Related to these issues of fact was the issue of law as to the effects of ss. 33 and 56 of the Contracts Act 1950 and the relevant authorities such as the Court of Appeal case of *Choo Chin Thye v. Concrete Engineering Products Bhd*. These would require proper

consideration at the trial. The appellant, on these issues of fact and law alone, had made out an appropriate case for stay. (paras 16, 17 & 19)

(2) If the appellant must show special circumstances, this court would apply the nugatory approach as being the most appropriate approach in the circumstances of this case *ie*, whether the judgment would be rendered nugatory if a stay pending appeal were granted. In this instance, the appellant had, by virtue of an affidavit by one of its directors, affirmed its substantial assets and sound financial standing which would enable it to satisfy the judgment sum if it eventually failed in the appeal. The said director had also affirmed that if a stay was not granted and if the huge sum of money was paid to the respondent, an accountant aged 61 years, the respondent would not be able to repay this sum with interest to the appellant in the event that its appeal was successful. There was no credible evidence in rebuttal by the respondent. Therefore, applying the nugatory approach in the circumstances of this case, a stay pending appeal would also be granted since it would not render nugatory the summary judgment given in favour of the respondent in the event of the appellant failing in its appeal in the Court of Appeal. (paras 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan perayu untuk perintah menggantung pelaksanaan satu perintah hakim Mahkamah Tinggi yang menolak rayuan perayu terhadap keputusan Penolong Kanan Pendaftar yang memberi penghakiman terus kepada responden – berhubung satu tuntutan untuk mendapatkan bayaran fee terhadap perayu – sementara menunggu rayuan ke Mahkamah Rayuan. Pertikaian berbangkit dari satu perjanjian khidmat nasihat ('perjanjian') yang dimasuki oleh responden dan enam pihak lain ('konsultan-konsultan') di satu pihak, dan perayu di pihak yang lain, yang tujuan tunggalnya adalah untuk menyenaraikan saham-saham sebuah syarikat yang sedang tenat, di mana, untuk maksud itu, konsultan-konsultan telah menawarkan khidmat dan kepakaran mereka kepada perayu bagi mendapatkan segala kelulusan perlu untuk melaksanakan suatu pengambil-alihan songsang dan seterusnya menyenaraikan saham-saham di Bursa Saham Kuala Lumpur ('KLSE'), tertakluk kepada dan mengikut syarat-syarat

perjanjian. Perayu berhujah bahawa ini adalah kes di mana penghakiman tidak harus diberikan secara terus dan tanpa satu perbicaraan penuh terhadap keterangan afidavit bercanggah, memandangkan wujud isu-isu fakta dan undang-undang serius yang perlu dibicarakan. Juga dihujahkan bahawa responden telah gagal mendapatkan penyenaraian pada tarikh dilanjutkan pada 31 Disember 2001 dan bahawa penyenaraian syarikat Harn Len Corporation Bhd ('Harn Len') pada atau lebih kurang pada 25 Julai 2003 adalah diusahakan oleh perayu sepenuhnya dan bukan melalui usaha responden. Perayu seterusnya berhujah bahawa membenarkan penggantungan tidak akan menyebabkan penghakiman menjadi sia-sia oleh kerana kedudukan kewangan perayu adalah kukuh dan ia mampu membayar jumlah penghakiman jika gagal dalam rayuannya. Membantah penggantungan, responden mengatakan bahawa tidak wujud isu-isu yang boleh dibicarakan dan bahawa merit kes bukanlah satu alasan untuk penggantungan. Responden juga berhujah bahawa kelengahan menyenarai adalah disebabkan oleh perayu dan bahawa tidak wujud halkaedaan istimewa bagi mewajarkan penggantungan.

Diputuskan (membenarkan permohonan)
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

(1) Perayu dalam pembelaannya mempertikai dengan seriusnya tuntutan responden yang, walau apapun, masih bertegas bahawa ia telah memenuhi akujanjinya walaupun penyenaraian dibuat lama selepas berlalunya tarikh dilanjutkan 31 Disember 2001, iaitu pada atau lebih kurang pada 25 Julai 2003. Perayu mengatakan bahawa oleh kerana responden gagal mendapatkan kelulusan-kelulusan relevan dari pihakberkuasa-pihakberkuasa berkenaan atau melaksanakan penyenaraian dalam tempoh yang ditetapkan, maka beliau telah gagal memenuhi janjinya yang merupakan satu syarat duluan sekaligus menyebabkan beliau tidak berhak untuk mendapat apa-apa bayaran atau fee. Responden mengatakan bahawa kelengahan penyenaraian adalah disebabkan kegagalan perayu memenuhi syarat-syarat yang dikenakan oleh pihakberkuasa-pihakberkuasa. Berkait terus dengan isu kegagalan mendapatkan penyenaraian dalam tempoh yang dilanjutkan adalah satu isu lain yang menjadi pertikaian serius di antara mereka, iaitu bahawa responden

telah mempertikai tuntutan perayu bahawa selepas tarikh lanjutan 31 Disember 2001, perayu berjaya memperoleh penyenaraian saham-saham Harn Len di KLSE atas usaha-usaha perayu sendiri. Tanpa memutuskan kes sebenar di atas merit, adalah jelas bahawa kedua-dua isu di atas merupakan isu-isu fakta yang perlu dibicarakan dan menjadi pokok pertikaian di antara pihak-pihak. Kedua-dua isu ini hanya boleh diputuskan dalam satu perbicaraan penuh, di mana hakim mempunyai kelebihan melihat dan mendengar saksi-saksi dan menilai kredibiliti mereka serta keterangan-keterangan lisan dan dokumentar. Ini tidak dapat dicapai dengan adilnya melalui keterangan afidavit bercanggah di sini melalui pendengaran permohonan penghakiman terus di bawah A. 14. Berkait dengan isu-isu fakta ini adalah isu undang-undang mengenai kesan-kesan ss. 33 dan 56 Akta Kontrak 1950 serta autoriti-autoriti relavan seperti kes Mahkamah Rayuan *Choo Chin Thye v. Concrete Engineering Products Bhd.* Semua ini memerlukan pertimbangan pada perbicaraan penuh. Atas isu-isu fakta dan undang-undang ini sahaja, perayu telah berjaya menunjukkan satu kes penggantungan yang wajar.

(2) Jikapun perayu perlu menunjukkan halkeadaan istimewa, mahkamah ini akan mengambil pendekatan sia-sia sebagai pendekatan yang paling sesuai dalam halkeadan kes di sini, iaitu sama ada penghakiman menjadi sia-sia jika penggantungan diberi sementara menunggu rayuan. Dalam kes di sini, perayu, melalui afidavit seorang pengarahnya, mengesahkan tentang kedudukan harta dan kewangannya yang kukuh sekaligus membolehkan perayu memenuhi jumlah penghakiman jika ia akhirnya gagal dalam rayuannya. Pengarah tersebut telah mengesahkan bahawa jika penggantungan tidak diberi dan jika satu jumlah yang besar dibayar kepada responden, seorang akauntan yang berumur 61 tahun, maka responden tidak akan dapat membayar balik jumlah tersebut beserta dengan faedah kepada perayu sekiranya rayuan perayu berjaya. Tidak ada keterangan sangkalan dari pihak responden mengenai pengataan ini. Oleh itu, menggunapakai pendekatan sia-sia dalam keadaan kes di sini, satu penggantungan sementara menunggu rayuan juga diberi kerana ia tidak akan menjadikan penghakiman terus yang diperolehi responden sia-sia jikapun perayu gagal dalam rayuannya di Mahkamah Rayuan.

Case(s) referred to:

Alexander v. Cambridge Credit Corporation Ltd [1985-1986] 10 ACLR 42 ***(refd)***

Choo Chin Thye v. Concrete Engineering Products Bhd & Other Appeals [2005] 2 CLJ 323 CA ***(refd)***

Hong Kong Bank Malaysia Bhd v. Wexcel Holdings Sdn Bhd & Ors [2004] 8 CLJ 252 HC ***(refd)***

Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 HC ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Lee Kuan Yew v. Jeyaretnam JB [1990] 1 LNS 78 ***(refd)***

Penang Port Commission v. Kanawangi Seperumaniam (No 1) [1997] 1 CLJ 423 CA ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 33, 56
Rules of the Court of Appeal 1994, r. 13
Rules of the High Court 1980, O. 14

For the appellant - Wong Kim Fatt (Wong Boon Lee with him); M/s Gulam & Wong
For the respondent - Tan Hee Soon; M/s Tan Hee Soon & Co

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-121-2005(1)]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

The Application

[1] This is an application of the appellant *vide* notice of motion dated 9 May 2007 (encl. 6a) for an order to stay the execution of the order of the learned judge made on 25 January 2007 pending appeal to the Court of Appeal. The application is supported by the affidavit of Mr. Low Kueck Shin affirmed on

A 8 May 2007 (encl. 6b), and opposed by the affidavit of the respondent Mr. Huang Yan Teo affirmed on 26 June 2007, to which the appellant filed an affidavit in reply also affirmed by Mr. Low on 9 July 2007.

B **Background Facts**

[2] The appellant, Low Nam Hui & Sons Sdn. Bhd., is a company incorporated in Malaysia. The respondent was an accountant previously employed by the appellant. The dispute herein arose from a Consultancy Agreement (exh. L2) dated C 31 December 1999 ("the said agreement") which the respondent and six other parties (who were collectively referred to as "the Consultants" in the said agreement) of the one part and the appellant of the other part had entered into on 31 December D 1999 for the sole purpose of listing the shares ("the listing") of the financially distressed company known as Sportma Corporation Berhad and for this purpose the respondent and the six other parties offered (in Recital 1 of the said agreement) "their expertise and services to the company for obtaining all the relevant E approvals for the purpose of reverse take-over exercise and listing of the shares of the PLC in the Kuala Lumpur Stock Exchange (hereinafter called "the said approvals"), subject to and in accordance with the conditions stated in the said agreement. A perusal of this agreement shows that under cl. 4, the seven F consultants (including the respondent) "shall procure and/or obtain the said approvals in writing which result into the successful listing of the shares". If they shall fail to procure the listing by 17 August 2000 or the extended date of 31 December 2001, cl. 4 of the said agreement provides that the said agreement shall be G treated as null and void. Clause 6 makes reference to the termination of the said agreement by lapse of time under cl. 4 above. It was not in dispute that by the extended date on 31 December 2001, the said approvals and the listing were not procured by the consultants. We were informed by counsel that, H when the respondent filed his claim in March 2005, the other six parties had not filed any claim against the appellant under the said agreement. In his statement of claim and summons in chambers for summary judgment under O. 14 of the Rules of the High Court 1980, the respondent claims the following against the appellant:

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(a) RM3,250,000 as the consultancy fees pursuant to the said agreement dated 31 December 1999. A

(b) RM162,500 as the 5% service tax.

(c) As substitution for (a) above, the appellant to pay the respondent the said consultancy fees in kind in shares of Harn Len Corporation Berhad of equal value, according to the current market value. B

(d) Interest at 8% p.a. on the sum of RM3,250,000 from the date of claim (26 August 2003) to the full payment of the said sum. C

[3] On 6 January 2006 the learned senior assistant registrar gave, under O. 14 of the Rules of the High Court 1980, summary judgment in favour of the respondent as prayed, and the D appellant's application for stay of execution of her order pending appeal to the judge in chambers was also dismissed by her. Being dissatisfied, the appellant appealed to the judge in chambers against her summary judgment. The learned judge dismissed the appellant's appeal to him with costs on 25 January 2007. On 2 E February 2007, the appellant appealed to the Court of Appeal against his order and thereafter applied to him for stay by summons in chambers supported by affidavit. Its application was opposed by the respondent, and on 7 May 2007, the learned judge dismissed the appellant's application for stay with costs. In F order to prevent execution of the order of the learned judge and to maintain the *status quo*, the appellant made the present application to the Court of Appeal. At the time of hearing of this application before us, the grounds of judgments of the learned judge dismissing the appellant's appeal and the stay application G were not available.

[4] Before us, learned counsel for the appellant, Dr. Wong Kim Fatt (assisted by Mr. Wong Boon Lee), contended that this was a case where judgment should not have been given summarily H without a full trial on conflicting affidavit evidence as there were triable issues of fact and law. He contended that the respondent had failed to procure the listing by the extended date of 31 December 2001 and that the listing on or about 25 July 2003 of Harn Len Corporation Berhad was procured by the sole effort of I

the appellant, not the effort of the respondent. Dr. Wong further contended that granting a stay would not render the judgment nugatory as the appellant was financially sound and would be able to pay the judgment sum in the event it lost the appeal.

[5] Learned counsel for the respondent, Mr. Tan Hee Soon, in objecting to the application, contended that there were no triable issues and that merit of the case was not a ground for stay. He contended that the delay in the listing was caused by the appellant. He further contended that there were no special circumstances to justify a stay, citing the Federal Court case of *Kosma Palm Oil Mill Sdn. Bhd. & Ors. v. Koperasi Serbaguna Makmur Bhd.* [2003] 4 CLJ 1, where the facts are different from those of this case. We would now address briefly the issues of merit of the appellant's case and whether there are special circumstances to justify a stay of the order of the learned judge.

Merit

[6] As the granting or refusing of a stay is in the unfettered discretion of the court, we are entitled to take all relevant factors into consideration, such as the competing interests of the parties, the merit of the appellant's application, and whether there are triable issues in a case such as the present one where the senior assistant registrar gave summary judgment against the appellant under an O. 14 application without a full trial and, as stated before, the appeal to the judge in chambers was dismissed with costs by the learned judge who had also dismissed with costs the appellant's application for stay.

[7] We agree with the judgment of VC George J (as he then was) in *Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors.* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 that in an application for stay, a distinction must be drawn between a case summarily decided and one decided after a full trial and enquiry. In a summary judgment case decided by a senior assistant registrar or a deputy registrar, a stay of execution of the order should normally be granted pending appeal to the judge in chambers if it can be shown that there are triable issues or that the appellant will probably succeed in the appeal. It is pertinent to note what the learned judge said at p. 658:

> In my view reliance on *Syarikat Berpakat* and on *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* (and on the cases cited in those judgments referred to therein) in respect of an application for stay pending appeal from the exercise of summary jurisdiction given by O. 14 by a Senior Assistant Registrar is misconceived.
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> An analysis of the judgments in those two cases and of the judgments cited therein shows that it would be more correct to state the rule as follows: Where judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances.

[8] We would state that in a case involving summary judgment, merit of the appeal is an important factor for consideration. The statutes or the rules of courts do not prohibit the courts from taking into consideration the merit of the application or the appeal in deciding whether or not to grant a stay and whether to impose any conditions on the stay which the courts consider to be reasonable. If merit is irrelevant, then injustice may be caused to an appellant/applicant in a case where the registrar or the judge decides the summary application arbitrarily or where they have wholly failed to consider the facts and law clearly favouring the appellant/applicant.

[9] A case on merit in the appeal for consideration is seen in *See Teow Guan & Ors v. Kian Joo Holdings Sdn. Bhd. & Ors* [1997] 2 CLJ 299 where Gopal Sri Ram JCA said at p. 313:

> Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure. In this state of affairs, would it be a proper exercise of discretion to permit a stay and cause a delay in the prosecution of the petition? I think not. Apart from the absence of merits, there are other reasons as well.

[10] Another case of merit in the appeal, ie "a very powerful appeal", for granting a stay is seen in the Court of Appeal case of *Penang Port Commission v. Kanawangi s/o Seperumaniam* [1997] 1 CLJ 423, where Mahadev Shankar JCA said at p. 433:

> The Appellant, in our view, had a very powerful appeal to argue on the measure of damages the Respondent was entitled to recover. The question as to whether the High Court could appoint him to the post he claimed to be qualified for was another issue.

A In all the circumstances, it was clear to us that there was a very real risk that the appeal would be wholly nugatory if we did not intercede. We therefore dismissed the Respondent's application and made an order in terms of the Appellant's application.

B **[11]** A more recent case similar to the present one is *Hong Kong Bank Malaysia Bhd. v. Wexcel Holdings Sdn. Bhd. & Ors.* [2004] 8 CLJ 252, where the plaintiff had obtained summary judgment. Abdul Malik Ishak J (now JCA), in considering the stay application pending appeal to the Court of Appeal, took into account that the defendants had a meritorious defence and that there were C triable issues, and granted a stay of the order of his immediate predecessor.

Special Circumstances

D **[12]** In an application for stay of an order after a full trial pending appeal, the general rule is that the appellant/applicant must show that there are special circumstances justifying a stay. It is often said that the courts will not deprive a successful litigant of the fruits of his litigation after a full trial, and will not grant a stay E unless special circumstances are shown by the unsuccessful party who is appealing to a higher court against the relevant order. Thus in the Singapore case of *Lee Kuan Yew v. Jeyaretnam JB* [1990] 1 LNS 78 judgment was given against the defendant after a full trial and Yong Pung How J (as he then was) dismissed the F application for stay of execution of the order pending appeal because the defendant had failed to show any special circumstances.

[13] The statutes or the rules of court do not define what G constitutes a special circumstance. This is left practically to the opinion and judicial discretion of the presiding judges. In a nutshell, a special circumstance must mean something out of the ordinary or something unusual. The category of special circumstances can never be limited or closed, as from time to time and case to case different and various factors may be accepted as H special circumstances. The judge sitting alone or the judges of an appellate court must decide, on the available evidence disclosed in the competing affidavits before him or them, whether there are special circumstances relating to the enforcement of the order or judgment in order to justify a stay of the order or judgment I appealed against, and on what terms, if any, which are reasonable.

There may be a situation in which one single factor by itself will not constitute a special circumstance. Depending on the facts of the case, there may also be a situation in which merit of the appeal and one or more factors considered together may amount to a special circumstance justifying a stay. The judge will have to balance the competing interests of the parties. Where the applicant can show that there is no risk that he will dispose of his assets pending appeal, the discretion is to grant a stay. In *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 CLJ 701, the Federal Court refused to interfere with the discretion of the judge to extend the order of stay. In *Kosma Palm Oil Mill Sdn. Bhd. v. Koperasi Serbausaha Makmur Bhd.* [2003] 4 CLJ 1, the Federal Court refused a stay as the applicants failed to establish special circumstances. It is pertinent to note what Augustine Paul JCA (as he then was), in delivering the judgment of the Federal Court in the *Kosma Palm Oil* case said of special circumstances and of nugatoriness with reference to the *See Teow Guan* case, at p. 16:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related. *See Teow Guan & Ors. v. Kian Foo Holdings Sdn. Bhd. & Ors.* could have withstood scrutiny if it had merely referred to nugatoriness without rejecting special circumstances. As nugatoriness is a species of special circumstances, a mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds on which an application may rely. Learned counsel for the applicants is therefore wrong in submitting that the nugatory approach is not a matter for consideration in this case as what is relevant is only the special circumstances. He would have been correct if he had said that he was not relying on nugatoriness but on some other species of special circumstances.

Granting Of Stay

[14] An appeal by itself does not operate as a stay of execution of the order appealed against. The appellant must therefore make an application to the Court of Appeal supported by affidavit evidence, ie, after the High Court judge has dismissed the stay application. The court, in hearing such an application, has the discretion whether to grant or refuse a stay of execution. That discretion must always be exercised judicially having proper regard to the circumstances and facts of each particular case. Rule 13 of the Rules of the Court of Appeal 1994 offers no guideline nor impose any fetters on the court's discretion. Rule 13 reads: "An appeal shall not operate as a stay of execution of proceedings under the decision appealed from unless the High Court or the court so orders and no intermediate act or proceeding shall be invalidated except so far as the court may direct". In this regard, the Court of Appeal, in the exercise of its judicial discretion, is entitled to consider all the relevant factors disclosed in the competing affidavits before deciding whether or not to grant a stay.

[15] The onus lies on the applicant to show special circumstances justifying a stay. He must satisfy the court on affidavit evidence on a balance of probabilities that there are special circumstances relating to the execution or enforcement of the order or judgment to justify a stay. Thus in *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161, Edgar Joseph Jr. FCJ, in delivering the judgment of the Federal Court and disagreeing with the judge who granted a stay, said at p. 169:

> We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorized agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the Judge could have granted the order for a stay.

The Case Before Us

[16] In the case before us, the appellant in its defence (paras 4 and 6) has seriously disputed the claim of the respondent, who nevertheless maintained that he had fulfilled his undertaking, notwithstanding the listing was procured well beyond the extended

date of 31 December 2001, ie, on or about 25 July 2003. The appellant contended that, as the respondent had failed to obtain all the relevant approvals from the relevant authorities and to procure the listing within the stipulated time, he had not fulfilled his promise or the condition precedent and was therefore not entitled to receive any fees or payment for his failure. The respondent contended in para 2 of his reply that the delay for the listing was caused by the failure of the appellant to satisfy the conditions imposed by the authorities. Directly related to this issue of failure to procure the listing by the stipulated extended date of 31 December 2001 is another issue on the serious dispute between the parties, ie, the respondent disputed the claim of the appellant that, after the extended deadline of 31 December 2001, the appellant had obtained solely on its own efforts the listing of the shares of Harn Len Corporation Berhad on the Kuala Lumpur Stock Exchange (now Bursa Malaysia).

[17] Without deciding on the merit of the case proper, we clearly are of the view that the above two issues are triable issues of fact and are central to the dispute between the two parties. These two issues can only be resolved at the full trial, where the judge has the advantage of seeing and hearing the witnesses and evaluating their credibility and the oral and documentary evidence. This cannot be achieved fairly on conflicting affidavit evidence in this case in an O. 14 summary judgment application. Related to these issues of fact is the issue of law as to the effects of ss. 33 and 56 of the Contracts Act 1950 and relevant authorities such as the Court of Appeal case of *Choo Chin Thye v. Concrete Engineering Products Bhd. & Other Appeals* [2005] 2 CLJ 323. These require proper consideration at the trial.

[18] In *Alexander v. Cambridge Credit Corporation Ltd.* [1985-1986] 10 ACLR 42, at p. 50 where Kirby P, applying a flexible practical rule for granting a stay, said:

> In our opinion it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour.

[19] We came to the conclusion that the appellant, on these issues of fact and law alone, had made out an appropriate case for stay, and we therefore on 18 July 2007 granted an order for stay of execution of the order of the learned judge until the hearing and disposal of the appellant's appeal in this court.

[20] We may now briefly address the issue raised by learned counsel for the respondent that the appellant had failed to show special circumstances to justify a stay. The nugatory factor forms a very important part of special circumstances. If the appellant must show special circumstances, we will apply the nugatory approach as being the most appropriate approach in the circumstances of this case, ie, whether the judgment would be rendered nugatory if we were to grant a stay pending appeal. In his affidavit of 9 July 2007, Mr. Low Kueck Shin, a director of the appellant company, had affirmed the appellant's substantial assets and that the appellant was of sound financial standing and would be able to satisfy the judgment sum if it eventually failed in the appeal. He had also affirmed that if a stay was not granted and if the huge sum of money was paid to the respondent, an accountant aged 61 years, the respondent would not be able to repay this sum with interest to the appellant in the event that its appeal was successful. There was no credible evidence in rebuttal by the respondent. At this juncture it may be relevant for us to refer to the judgment (cited with approval by the Federal Court in the *Kosma Palm Oil* case) of Abdul Malik Ishak J (as he then was) in *Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) & Anor. v. Raja Zainal Abidin Raja Hussin* [1996] 2 CLJ 353 where the learned judge said at 356:

> The allegation of dissipation of assets was a mere speculation and that cannot be special circumstances, so submitted Mr. Wong Kim Fatt. He next argued that to lock up the money which Raja Zainal Abidin was entitled to must surely be a grave prejudice and, consequently, the stay ought not to be granted. I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not insolvent and this assumption is clearly borne out by his affidavit in enclosure 45.

[21] We are therefore of the view that, applying the nugatory approach in the circumstances of this case, we would also grant a stay pending appeal, as the stay would not render nugatory the summary judgment given in favour of the respondent in the event of the appellant failing in its appeal in the Court of Appeal. The costs of this application will be costs in the cause.